

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A
JUDGE: CYNTHIA A. HOLLOWAY
NO.: 00-143

Florida Supreme Court
Case No.: SC00-2226

JUDICIAL QUALIFICATIONS COMMISSION'S RESPONSE TO
JUDGE CYNTHIA A. HOLLOWAY'S MOTION TO COMPEL

JUDICIAL QUALIFICATIONS COMMISSION (hereinafter "JQC"), hereby files its Response to Judge Cynthia A. Holloway's Motion to Compel, as follows:

1. On December 14, 2000, the JQC filed its Witness list, Catalogue of Sworn Statements and/or Transcripts, pursuant to Florida Judicial Qualifications Commission Rule 12(b). In addition to deposition transcripts and transcripts of sworn statements, the disclosure provided the names and addresses of nineteen potential witnesses, eighteen of whom are employed and/or reside in Tampa, Florida. Of the eighteen witnesses listed by the JQC, five work in the Hillsborough County Courthouse, one is Judge Holloway's husband and the other is her brother. The remainder of the witnesses are either attorneys or employees associated in one way or another with the Hillsborough County criminal justice system.

2. On January 3, 2001, the undersigned received correspondence from Scott Tozian, counsel for Judge Cynthia A. Holloway, requesting any and all written interview summaries of the above witnesses as well as any investigative reports prepared by the JQC investigator. In furtherance of his demand, Mr. Tozian stated he was entitled to the written summaries and reports "just as a criminal defendant would be entitled to police reports and

witness interview summaries prepared by law enforcement.”

3. On January 16, 2001, the undersigned advised Mr. Tozian in writing that we objected to the production of the interview summaries and investigative reports as same were obtained and prepared by the JQC’s investigator in anticipation of litigation and thus protected by the work product doctrine. We further advised Mr. Tozian that the written summaries were not written statements authored by a witness or signed or otherwise adopted by any of the witnesses interviewed. Furthermore, that the requested summaries were additionally not discoverable as they failed to meet the definition of “a statement” pursuant to Florida Rule of Civil Procedure 1.280(b)(3). (*See* Special Counsel’s correspondence dated January 16, 2001, attached as Exhibit I.)

4. On or about January 31, 2001, Mr. Tozian filed a Motion to Compel the witness interview summaries. In support of the Motion to Compel, Mr. Tozian argued that the materials requested were taken prior to the determination that formal charges would be filed and therefore, not prepared in anticipation of litigation.

5. It is well settled that a party may be ordered to provide the names and addresses of individuals who have furnished statements in anticipation of litigation, “absent rare and exceptional circumstances,” *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 113 (Fla. 1970), the party may not be required to furnish the statements themselves because such statements are

work product. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 S.Ed. 451 (1947); *Miami Transit Co. v. Hurms*, 46 So.2d 390 (Fla. 1950), *Karch, MacKay*, 453 So. 2d 452 (Fla. 4th DCA 1984). In the present case, Mr. Robert Butler, a private investigator, retained and under contract by the JQC, conducted a series of interviews in furtherance of the investigation regarding the complaint filed against Judge Holloway and in anticipation of litigation. Mr. Butler took non-verbatim, hand written notes during each interviews and later drafted typed witness summaries using his notes and his personal recollection of the witnesses' testimony. The typed summaries were then provided to Mr. Thomas C. MacDonald, Jr., General Counsel for the JQC for use in determining the existence of probable cause needed before the Formal Charges against Judge Holloway were filed. (*See*, Sworn Affidavit of Robert Butler attached as Exhibit II.) Therefore, the requested witness summaries are the work product of the JQC and thus protected by the privilege afforded such documents.

5. Counsel's argument that the witness' summaries sought to be disclosed are not work product because they were taken at the direction of the JQC and are the basis for the underlying charges rather than mere attorney work product is factually and legally insufficient. The requested witness' summaries were never admitted into evidence as fact. They were solely prepared as an investigatory tool in furtherance of the present investigation and in anticipation of litigation.

Documents prepared before any litigation is formally commenced are still protected by the work product doctrine as long as there is a substantial possibility that litigation will occur. In *Barnett Bank v. Dottie-G Development*, 645 So.2d 573 (Fla. 2nd DCA 1994), the court held documents are subject to the work product privilege even when litigation is neither pending nor threatened, so long as there is a possibility that a suit might ensue. See *Anshor Nat'l Fin. Services, Inc. v. Smeltz*, 546 So.2d 760, 761 (Fla. 2d DCA 1989). Furthermore, Mr. Butler's written summaries are precisely the type of document intended for protection under the work product doctrine. The First District Court of Appeals has specifically held that "protection from discovery includes documents prepared in anticipation of litigation by or for a party, or by or for that party's representative..." *Procter & Gamble Co. v. Swilley*, 462 so.2d 1188, 1193 (Fla. 1st DCA 1985).

6. Counsel for Judge Holloway also claims that the written summaries should be produced as "the ultimate goal of the discovery process in a JQC prosecution should not be the manipulation of discovery obligations to hinder the defense..." In their Motion for Protective Order, opposing counsel claims it is "unfair" and an "undue burden" for Judge Holloway to appear for deposition without first knowing what each witness interviewed by the JQC investigator has said.

The undersigned is of the belief that the ultimate goal of any prosecution is the search

for the truth and if we are fortunate, Justice for all parties concerned. The search for truth is not best served by the forced production to the opposition of the JQC's work product, especially prior to the deposition the subject of the investigation. The rationale supporting the work product doctrine is that "one person is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures. *DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988, 990 (Fla. 3rd DCA 1994); *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1385 (Fla. 1994).

7. Furthermore, Rule 1.280 (b) (3) specifically provides that a party may obtain discovery of an opposing party's "documents ... prepared in anticipation of litigation... only upon a showing that the party seeking discovery has need of the material in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." (emphasis added) Opposing counsel has failed to establish the requisite showing that they are unable without undue hardship to obtain the substantial equivalent information by other means. As previously stated, each and every witness listed by the JQC (with the exception of the complaining witness, Mark Johnson) is either related to Judge Holloway, works with her or is in some way connected to the criminal justice system. By opposing counsel's own admission, they have already interviewed numerous witnesses listed

by the JQC and thus have presumably learned the contents of the investigative interviews. In so doing, Mr. Tozian had diminished if not eliminated any argument in support of the “undue hardship” threshold requirement which must be met before the work product privilege can be overruled.

WHEREFORE, the undersigned Special Counsel, on behalf of the JUDICIAL QUALIFICATIONS COMMISSION, hereby files its Response to Judge Cynthia A. Holloway’s Motion to Compel, and respectfully asks this Hearing Panel to enter an Order denying Judge Holloway’s Motion to Compel the JQC investigative reports and witness summaries and order her to appear for deposition in furtherance of this cause.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida 500 South Duval Street, Tallahassee, Florida 32399-1927; with copies by U.S. Mail and Facsimile to: Scott K. Tozian, Esquire, SMITH & TOZIAN, P.A., 109 North Brush Street, Suite 150, Tampa, Florida 33602; Michael S. Rywant, Esq. RYWANT, ALVAREZ, JONES, RUSSO & GUYTON, P.A., 109 N. Brush Street, Suite 500; John Beranek, Esquire, AUSLEY & McMULLEN, Washington Square Building, 227 Calhoun Street,

Tallahassee, Florida 32302; Honorable James R. Jorgenson, Chair, Hearing Panel, Third District Court of Appeals, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; and Thomas C. MacDonald, Jr. General Counsel, JQC, COOK & MACDONALD, 100 N. Tampa Street, Suite 2100, Tampa, Florida 33602, this _____ day of February, 2001.

By: _____
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